Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1516

WILLIAM MIRIN, dba Strip Cab Co., and RAYMOND CHENOWETH, dba Nellis Cab Co.,
Petitioners,

vs.

THE STATE OF NEVADA ON RELATION OF ITS PUBLIC SERVICE COMMISSION; NOEL CLARK, EVO GRANADA and HEBER HARDY, acting in their official capacity; THE TAXICAB AUTHORITY OF CLARK COUNTY, a State Agency; MANUEL CORTEZ, JAMES JONES, JOE LA VOIE, and B. J. HANDLON, acting in their official capacity,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

OPENING STATEMENT

Petitioners, Raymond Chenoweth and William Mirin, Plaintiffs below, pray that a Writ of Certiorari issue to review the judgment of the Ninth Circuit Court of Appeals whose decision is reported

as *Mirin v. State of Nevada ex rel. Public Service Commission,* 457 F. 2d 91. (Appendix A). The appeal was taken from a decision of District Court Judge Roger D. Foley, District of Nevada. (Appendix B).

The decision of the Court of Appeals was entered October 22, 1976, and a timely Petition for Rehearing and suggestion for rehearing en banc was denied by an order filed February 2, 1977.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 USC 1254(1), and the United States Constitution, Amendments Five and Fourteen.

QUESTIONS PRESENTED FOR REVIEW

I. Does a prior court judgment, obtained through the perpetration of an outrageous fraud on a plaintiff by his own attorney in collusion with an adverse interest, operate to bar any further claims on behalf of that plaintiff by virtue of the doctrine of res judicata?

II. May a court totally disregard uncontradicted and undisputed evidence and rule contrary to that evidence?

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the Fifth Amendment to the United States Constitution which reads:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a present-

> ment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War, or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

On December 10, 1971, Petitioners Chenoweth and Mirin, along with Pete Eliades, filed a complaint in the District Court of Nevada alleging violations of their Fifth and Fourteenth Amendment rights to just compensation and due process, as well as their right to just compensation under the Nevada Constitution. The complaint alleged the Public Service Commission of Nevada had summarily confiscated Plaintiffs' property consisting of the operating rights to approximately 186 taxicabs, this having occurred without any hearing, notice, or compensation being afforded the Plaintiffs. Each of the three plaintiffs sought relief by way of inverse condemnation for the value of these operating rights (worth in excess of $25,000.00 each) or, in the alternative, for equitable relief directing return of these operating rights.

The case was ultimately submitted by stipulated facts and affidavits for summary judgment pursuant to motions filed by both sides. Interestingly, the evidence presented to the Court showed that the De-

fendants admitted Plaintiffs had the operating rights and that they were taken without notice, hearing, or compensation.

By memorandum decision the District Court granted the Defendants' Motion for Summary Judgment against Petitioners (but not against Plaintiff Eliades) on the ground their claims were barred by the doctrine of res judicata. In the District Court this was based upon a prior federal case and a State of Nevada Court case. In neither case was there a trial on the merits, the federal case having been ordered dismissed by the same District Court on technical grounds, and the Nevada State case being only a decision coming from a preliminary injunction hearing. Neither case sought damages by way of inverse condemnation. However, the District Court in the instant case and the Ninth Circuit Court of Appeals held that in the prior federal case the question of inverse condemnation *could* have been raised, and since it was not it acted as a res judicata bar.

Prior to the appeal in the instant case to the Ninth Circuit, Petitioners discovered some new and extremely relevant evidence, namely that the attorney representing the Petitioner in the aforementioned State and federal cases had simultaneously been representing an adverse interest under an agreement with that adverse interest that he (the attorney) "would not be too effective in representing Chenoweth and Mirin" in their legal actions. Prior to the entry of the Summary Judgment, Petitioners presented this evidence to the District Court, all of it supported by

affidavits, in a Motion for Reconsideration. One of the affidavits was from the very person who had contracted with the attorney to perform his sham representations of Petitioners. This evidence was totally uncontradicted and uncontested by the Defendants whatsoever. Nevertheless, the District Court denied the Motion for Reconsideration and entered the Summary Judgment against Petitioners.

On appeal to the Ninth Circuit, Petitioners raised, among other issues, the question of whether or not an uncontested factual showing that an attorney representing Petitioners in the former litigation had conducted sham representation by agreement with an adverse interest, precludes the application of the doctrine of res judicata in the instant action. The Ninth Circuit affirmed the District Court ruling, stating that the denial of consideration of this new evidence was within the trial court's discretion and there was no abuse of that discretion!!

REASONS FOR GRANTING THE WRIT

Chief Justice Burger has urged that requests for hearing to this court be short and to the point. We have tried to do that in this Petition, trusting that brevity would never indicate insignificance. We believe the decisions below are in error because they are completely contrary to any notion of fair play as embodied in the due process clause of the Fifth Amendment, and further these decisions are in direct conflict with the applicable decisions of this Supreme

Court. Forgetting for a moment the "lingo of lawyers" we can say that this is a case in which Petitioners "ain't had no justice nowhere, noway, no how".

In the prior State Court case the attorney then representing Petitioners (and the adverse interest with whom he had contracted) failed to act timely on an appeal, and thus the foot dragging was effective. In the prior federal case he failed to allege the necessary jurisdictional grounds, and also failed to include the inverse condemnation claim. Again he effectively served the adverse interest against Petitioners who he was supposedly representing. And the Courts below have said that these cases now bar Petitioners. As yet Petitioners have never had their day in court when they were allowed to present evidence on the facts and then have a combined decision on those facts along with the law to determine whether or not they are entitled to have back their legally acquired rights to operating a certain number of taxicabs, or in the alternative to be compensated for the illegal taking from them of those rights. There can be no justice in a legal system which says that even though individuals have been fraudulently done in by an attorney, the cases in which that attorney acted will act as a bar to the individuals presenting their case for a hearing on the merits. This is especially true when the new case raises issues never before presented, and when the individuals have never had a hearing on the merits.

The concept of due process embodied in the Fifth Amendment has traditionally been equated by this

Court and all other courts with the notion of fundamental fairness. Whatever else the term encompasses within its scope, certainly at its most basic level it means that where a person attempts to bring a claim in a court of law he will be afforded a fair opportunity to present his arguments in a truly adversary proceeding. If such opportunity is denied a party to a judicial proceeding then there can be no fair opportunity to be heard, no trying of the facts, and thus no real trial in the legal sense of the word.

This Court has long recognized that where extrinsic fraud has been practiced in a judicial proceeding there has never been a real adversary hearing. This Court first stated this exception to the general rule regarding the binding effect of judgments in *United States v. Throckmorton,* 98 U.S. 61 (1878).[1] There, Justice Miller reviewed the need to prevent repeated litigation between the same parties in regard to the same subject of controversy and the various avenues of relief open to dissatisfied litigants:

> "If the court has been mistaken in the law, there is a remedy by writ of error. If the jury has been mistaken in the facts, the remedy is by motion for new trial. If there has been evidence discovered since the trial, a motion for a new trial will give appropriate relief. But all these are

[1]This Court has cited *United States v. Throckmorton* with approval in the following cases: *Hazel-Atlas Co. v. Hartford,* 322 U.S. 238, 244 (1943); *Schneiderman v. United States,* 320 U.S. 118, 124 (1942); *Reed v. Allen,* 286 U.S. 191, 199 (1931); *United States v. Ness,* 245 U.S. 319, 325 (1917); *Chaloner v. Sherman,* 242 U.S. 455, 462 (1916); *United States v. Beebe,* 180 U.S. 343, 349 (1900); *Hilton v. Guyot,* 159 U.S. 113, 207 (1894); *Marshall v. Holmes,* 141 U.S. 589, 596 (1891); *Pacific R.R. of Mo. v. Missouri Pacific R'y,* 111 U.S. 505, 520 (1883).

parts of the same proceeding, relief is given in the same suit, and the party is not vexed by another suit for the same matter. So in a suit in chancery, on proper showing a rehearing is granted. If the injury complained of is an erroneous decision, an appeal to a higher court gives opportunity to correct the error. If new evidence is discovered since the decree has become final, a bill of review on that ground may be filed within the rules prescribed by law on that subject. Here, again, these proceedings are all part of the same suit, and the rule framed for the repose of society is not violated.

The Court went on to recognize a limited class of exceptions to the general rule of res judicata:

"But there is an admitted exception to this general rule in cases where, by reason of something done by the successful party to a suit, there was in fact no adversary trial or decision of the issue in the case. Where the unsuccessful party has been prevented from exhibiting fully his case, by fraud or deception practiced on him by his opponent, as by keeping him away from court, a false promise of a compromise; or where the defendant had no knowledge of the suit, being kept in ignorance by the acts of the plaintiff, *or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side*—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open

the case for a new and fair hearing. See Wells, Res Judicata, sect. 499; *Pearce v. Olney,* 20 Conn. 544; *Wierich v. DeZoya,* 7 Ill. 385; *Kent. v. Richards,* 3 Md. Ch. 392; *Smith v. Lowry,* 1 Johns (N.Y.) Ch. 320; *DeLouis, et al. v. Meek, et al.,* 2 Iowa 55.

In all these cases, and many others which have been examined, relief has been granted, on the grounds that, by some fraud practiced directly upon the party seeking relief against the judgment or decree, that party has been prevented from presenting all of his case to the court." 98 U.S. at 65-66. (Emphasis added).

The rule of law to be gleaned from this Court's decision in *Throckmorton* is that the demand of public policy that there be an end to litigation yields to the interests of justice where extrinsic fraud has been practiced upon a party, because the natural and inevitable effect of such fraud is to deprive that party of the opportunity of fully presenting his case and renders the result as to him no real trial at all.

Petitioners, in their Motion for Reconsideration, presented to the trial court uncontradicted evidence regarding the fraudulent misconduct of their prior attorney. That evidence consisted of sworn affidavits by the *very party who contracted with that attorney to perform sham representation* for Petitioners! These affidavits were unopposed and in fact Respondents failed to contest the matter with *any* evidentiary material whatsoever. Nevertheless, the trial court denied the Motion without explanation. The appellate court merely stated that it deemed without merit Peti-

tioners' contention that, based on the evidence of the affidavits, the prior federal court case was not an adversary proceeding and, further, that the trial court had not abused its discretion in denying the Motion.

We ask how a court of law can, under these circumstances, rule so unfairly? How can a court of law, faced with undisputed evidence of fraud having been practiced on a court and its litigants (that evidence in the form of sworn testimony by one of the two parties involved in the fraud) rule contrary to that evidence? How can the ruling below stand in the light of this Court's long-standing doctrine established in *Throckmorton?* How is such a gross misapplication of the law not an abuse of discretion?

Petitioners cannot answer these questions because they believe that the integrity of our judicial system must be protected. They believe that the Fifth Amendment right of due process protects that integrity by affording a litigant access to the courts and a fair day in court. They believe that this Court was legally and ethically correct in its holding in *Throckmorton.* Finally, Petitioners believe that this Court was sincere in its promise in *Throckmorton* to protect the litigant whose own attorney has "connived at his defeat."

CONCLUSION

Unless this Court grants this Writ Petitioners will be forever barred from fully and fairly presenting their claims in this matter by a prior judgment obtained in the most outrageously and shamefully manner possible—through the "buying off" of an officer of the court. We must not allow such an unconscionable violation of the Fifth Amendment, the integrity of our courts, and the concept of justice.

Therefore, Petitioners pray that this Honorable Court prevent such a horrendous miscarriage of justice and grant this Writ. We suggest that the case should simply be summarily referred back to the District Court with an order that these Petitioners proceed to trial along with the remaining Plaintiff, Pete Eliades, whose case awaits trial pending the final decision as to Petitioners.

Dated, April 28, 1977.

Respectfully submitted,

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(Appendices Follow)

APPENDICES

Appendix A

United States Court of Appeals
for the Ninth Circuit

No. 75-3203

William Mirin, dba Strip Cab Co., and Raymond Chenoweth, dba Nellis Cab Co.,
Plaintiffs-Appellants,

vs.

The State of Nevada on Relation of its Public Service Commission, et al.,
Defendants-Appellees.

[Filed Oct. 22, 1976]

Appeal from the United States District Court
For the District of Nevada

OPINION

Before: CHAMBERS and CHOY, Circuit Judges, and EAST, District Judge*

EAST, District Judge:

Appellants above named (sometimes herein called Mirin and Chenoweth) appeal from a summary judgment in favor of Appellees (Commission) entered

*Honorable William G. East, Senior United States District Judge for the District of Oregon, sitting by designation.

by the District Court on August 1, 1975 on the ground that the matters and issues raised by Appellants in their attack upon the Commission's allocation orders limiting the number of operable taxicabs (cabs) by Appellants under their respective certificates of necessity were barred under the Doctrine of Res Judicata. We affirmed.

Three pertinent issues on review are presented:

1. Did the District Court hold jurisdiction over the subject matter of the proceedings?
2. Did the District Court err in granting the summary judgment of res judicata and dismissal?
3. Did the District Court err in refusing to reconsider and modify its conclusion of res judicata and dismissal of the cause on the grounds of bribery of Appellants' counsel, alleged and raised after trial and entry of the District Court's conclusion?

Appellants are cab operators in Las Vegas, Nevada. During the year 1965, the Commission issued several certificates of public convenience and necessity to Mirin and Chenoweth. The certificates did not limit the number of cabs that Mirin and Chenoweth could respectively operate in Las Vegas.

Thereupon Mirin and Chenoweth each purchased a number of cabs and equipment for operation under his certificate of necessity.

On December 14, 1966, following a duly noticed hearing, the Commission issued an order limiting

Mirin and Chenoweth to the operation of one cab each.

On January 15, 1968, the Commission, following a Nevada state court's decision holding that the Commission lacked power and authority to allocate, suspended its prior orders of allocation. Thereafter during the year 1968, the Supreme Court of the State of Nevada reversed and held that the Commission did have the power and authority to issue its December 14, 1966 order of allocation and mandated the Commission to reinstate that order. *Checker, Inc. v. Public Service Commission,* 84 Nev. 633, 446 P.2d 981 (1968). Thereupon the Commission re-implemented the December 14, 1966 order of allocation during January of 1969. The re-implementation of the December 14, 1966 order remained in effect until July 18, 1969 when the Commission issued a new allocation order.

Early in 1969 Mirin and Chenoweth instituted proceedings in the District Court seeking to enjoin the Commission's January, 1969 reinstatement of the December 14, 1966 allocation order of one operable cab to each of them. The main attack was to restrain the operation of the December 14, 1966 order until such time as the Commission should hold duly noticed hearings and enter its new allocation order. Their cause was predicated upon the grounds that the order deprived them of their rights and property without just compensation and due process of law and denied them equal protection of the law, vis-a-vis, their competitors.

The District Court denied injunctive relief and dismissed the complaint and action for want of subject matter jurisdiction. On appeal, this court, in *Mirin v. Taxi Cab Authority of Clark County, Nevada,* 441 F.2d 1123 (9th Cir. 1971) [hereinafter *Mirin-1*],[1] affirmed the dismissal but held that the complaint did allege a federal question and opined that the dismissal should have been for a failure to state a claim upon which relief could be granted. This court further noted, as an alternative ground for the dismissal, the issuance by the Commission, following a duly noticed hearing, of a new allocation order under the date of July 18, 1969, which mooted the attack upon the December 14, 1966 order.

While *Mirin-1* was in progress, Mirin and Chenoweth in August of 1969 applied to a Nevada state court for injunctive relief from the application of the Commission's July 18, 1969 allocation order claiming that the order in effect was an invalid extension of the December 14, 1966 allocation of one operable cab to each of them. The Nevada state court denied injunctive relief and validated the July 18, 1969 order under the rationale of *Checker, Inc., supra.* The Supreme Court of the State of Nevada dismissed an appeal on procedural grounds.

Shortly after this court's decision in *Mirin-1,* the Appellants on December 10, 1971 instituted the present proceedings in the District Court challenging the Commission's re-implementation of the December

[1]The Commission is the lawful successor to the Taxi Cab Authority of Clark County, Nevada.

14, 1966 allocation of one cab each on the grounds the allocation order violated the Fifth and Fourteenth Amendments' immunities and rights to just compensation and due process. They sought damages in inverse condemnation from the alleged summary confiscation of their taxicab operation properties as of January 29, 1969, the date of the reinstatement of the December 14, 1966 allocation order of one cab each. They alternatively sought mandatory injunctive relief directing a return of their operating rights under their initial certificates of necessity.

The District Court granted the summary judgment in favor of the Commission on the grounds that the issues presentable and the holdings in the August, 1969 Nevada state court proceedings and *Mirin-1* barred the relief sought in these proceedings under the Doctrine of Res Judicata between the parties.

Issue 1:

Since the subject matter of the claims in *Mirin-1* and in these proceedings are basically the same constitutional attack upon the Commission's allocation order of December 14, 1966, we conclude, under the rationale of *Mirin-1,* that the District Court had subject matter jurisdiction.

> "If a complaint raises a federal question, the mere claim confers power on the District Court to decide that it has no merit as well as to decide that it has. Plaintiffs asserted a claim under 28 U.S.C. § 1343(3) . . . [Citation omitted]. The dismissal of the action was proper but it should have been dismissed because the petition failed

to state a claim upon which relief could be granted. . . ." *Mirin-1* at 1125.

Issue 2:

It is clear the parties involved in these proceedings and those in *Mirin-1* are identical or their privies. Further, Appellants' attack upon the Commission's reinstatement of its allocation order of December 14, 1966 in *Mirin-1* and their attack upon the same order in these proceedings are each based upon the same federal questions and claims which were, or could have been, raised in *Mirin-1*. We conclude the District Court did not err in holding that Appellants' federal questions and claims in these proceedings were barred under the Doctrine of Res Judicata. The valid and final judgment in *Mirin-1* operates as an absolute bar to a second suit between the same parties or their privies based on the same cause of action not only in respect of every matter actually litigated, but also as to every ground of recovery or defense which might have been presented. *Filice v. United States,* 271 F.2d 782 (9th Cir. 1959), *cert. denied,* 362 U.S. 924 (1960). *See Lawlor v. National Screen Service,* 349 U.S. 322, 326 (1955). Furthermore, the seeking of only injunctive relief by Appellants in *Mirin-1* is of no consequence. We adopt the rationale of *Clarke v. Redeker,* 406 F.2d 883, 884-85 (8th Cir. 1969), holding that a suit for injunctive relief is preclusive of a later suit for damages based upon the same cause of action.

We do not reach the question of res judicata or judicial estoppel effect of the August, 1969 Nevada

state court conclusions and holdings upon these proceedings.

Issue 3:

Following the entry of the District Court's memorandum opinion that a summary judgment in favor of the Commission should issue under the Doctrine of Res Judicata but prior to the entry of such judgment, Appellants moved for a reconsideration of the conclusion. In support of a prong of that motion, the Appellants tendered two affidavits which they claim showed that their attorney of record in the District Court phase of *Mirin-1* took bribes from non-parties to perform sham representation of Mirin and Chenoweth. Accordingly they assert *Mirin-1* was not an adversary proceeding worthy of the application of the Doctrine of Res Judicata. We deem the assertion to be without merit. The denial of reconsideration was within the discretion of the District Court and we find no abuse of that discretion.

Appellants failed to show any prejudice to their meritless causes through their counsel's representation.

The summary Judgment in favor of the Commission entered by the District Court on August 1, 1975 is affirmed.

AFFIRMED.

Appendix B

In the United States District Court
For the District of Nevada

Civil LV-1738 RDF

William Mirin, dba Strip Cab Co., Raymond Chenoweth, dba Nellis Cab Co., Las Vegas Star Taxi, Inc., through its sole stockholder, Pete Eliades dba Star Taxi Co.,
Plaintiffs,

vs.

The State of Nevada on Relation of Its Public Service Commission; Noel Clark, Evo Granada and Heber Hardy, acting in their official capacity; The Taxicab Authority of Clark County, a State Agency; Manuel Cortez, James Jones, Joe La Voie, and B. J. Handlon, acting in their official capacity,
Defendants.

[Filed Dec. 27, 1974]

MEMORANDUM RE PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, FILED JANUARY 15, 1974, AND DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT, FILED FEBRUARY 21, 1974

Facts

This is an action for damages or, alternatively, mandatory injunction alleging denial of due process

and equal protection and a taking of property without just compensation. Plaintiffs allege jurisdiction under 28 U.S.C. § 1331 (federal question jurisdiction), claiming damages in excess of $10,000, and under 28 U.S.C. § 1343, 42 U.S.C. § 1983 (the Civil Rights Act). The facts leading to the instant motions are taken from plaintiffs' second amended complaint, facts stipulated to by counsel, facts appearing from unchallenged affidavits submitted by the parties, certified documents also submitted, and from the following cases referred to by counsel: Checker, Inc. v. PSC, 446 P. 2d 981 (Nev. 1968); Mirin v. Taxi Cab Authority, 441 F. 2d 1123 (9th Cir. 1971). Chronologically:

1. In 1965 the Nevada Public Services Commission (PSC) issued a certificate of public convenience and necessity to plaintiff Mirin and a like certificate to plaintiff Chenoweth. In January 1966, Star Taxi Company (the supposed forerunner of plaintiff "Las Vegas Star Taxi, Inc., through its sole stockholder Pete Eliades") was similarly issued such a certificate (Eliades did not own Star Taxi at this time but was an employee). In February 1966, plaintiffs' competitors signed a contract agreeing to limit the number of taxicabs in Clark County, Nevada. This contract was included in a Clark County Allocation Order (#253) under a Clark County ordinance subsequently declared unlawful by a Nevada district court in January 1968. On December 14, 1966, the PSC assumed the authority to allocate the number of cabs operated by each certificate-holder and issued an order limiting plaintiffs to a specified number of cabs (Mirin 1,

Chenoweth 1, Star Taxi 3). This order followed a duly noticed hearing at which all interested carriers appeared. Plaintiffs now allege that the private contract limiting competition referred to above was unlawfully incorporated into this PSC order.

2. On October 27, 1967, the PSC issued plaintiffs Mirin and Chenoweth new certificates which expanded the geographical limits previously placed upon these plaintiffs. These new certificates stated that the number of cabs allocated to the holder would be governed by future allocation orders. Mirin and Chenoweth began expanding their facilities and the number of cabs they operated.

3. On January 10, 1968, a Nevada district court, in a habeas corpus proceeding instituted by Mirin and Chenoweth (who had been arrested for operating too many cabs) ruled that the PSC lacked authority to allocate cabs in Clark County (as well as ruling the Clark County allocation order invalid, see 1 supra). Because of this ruling, the PSC, ex parte, suspended its prior orders purporting to allocate cabs on January 15, 1968. Mirin and Chenoweth continued to expand and Star Taxi began expansion.

4. On March 27, 1968, in another civil action instituted by Mirin and Chenoweth, a Nevada district court held that the PSC *did* have the power to allocate cabs. Because of this ruling, the PSC reinstated its December 14, 1966, order ex parte on March 29, 1968.

5. On May 27, 1968, in a habeas corpus action by Mirin and Chenoweth (who were again arrested for

operating too many cabs), a Nevada district court itself designated the number of cabs which all carriers could operate in Clark County. Based mainly upon this court allocation, the PSC entered a new allocation order ex parte, giving plaintiffs an increased allocation over the December 14, 1966, order.

6. On November 8, 1968, the Nevada Supreme Court, reviewing many of plaintiffs' actions above even though plaintiffs were not parties before the Court, ruled that the district court allocation of May 27, 1968, could not stand since the district court had acted without jurisdiction (indispensable parties being absent), that the PSC did have the power to allocate cabs, that the December 14, 1966, PSC order was valid, and that subsequent orders of the PSC were invalid because issued ex parte and not in conformity with the Nevada Administrative Procedure Act. Checker, Inc. v. PSC, 446 P. 2d 981 (Nev. 1968). Finally, the Court ruled that the PSC was to hold prompt hearings after due notice and, after this opportunity for carriers to be heard, allocate cabs. Id.

7. The Nevada Supreme Court issued a writ of mandate on January 28, 1969, ordering the PSC to reinstate its allocation order of December 14, 1966. The Court found such action to be necessary in light of the PSC's failure to hold timely hearings and the resulting "condition of chaos" in the Clark County taxicab industry. The PSC complied and reinstated its December 14, 1966, allocations on January 29, 1969. It is out of these occurrences that the instant case arises. Alleging that they were not given notice or hearing at this Nevada Supreme Court action,

and that compliance with the mandate and PSC implement-order resulted in reallocation of their cab allotments to competitors, plaintiffs claim denial of due process and equal protection and a taking without just compensation. Plaintiffs seek damages from January 29, 1969, to date of trial or, alternatively, a mandatory injunction returning plaintiffs to their position, in terms of the number of cabs they may operate, of January 28, 1969.

8. In January 1969 in Civil Case LV-1256, plaintiffs Mirin and Chenoweth sought an injunction in this court prohibiting reinstitution of the 1966 allocation order until full hearings in which all carriers could be represented and heard could be had. They alleged substantially identical matters in that action as are presented here, but failed to allege the federal question jurisdictional amount required to be in controversy and alleged their Civil Rights Act causes of action against entities which are not "persons" amenable to suit under the Act. This Court dismissed for lack of subject matter jurisdiction.

9. The PSC, pursuant to the Nevada Supreme Court's directive, finally held public hearings in which plaintiffs were among the thirty-six witnesses who testified. After forty-five days of hearings, on July 18, 1969, a new allocation order, based on "the testimony and evidence" presented at the hearings and an algebraic formulation developed to augment the December 14, 1966, allocation, was issued by the PSC.

10. At some point after these hearings and the new PSC ruling, Pete Eliades purchased Star Taxi

Company, changing what was operated as a partnership by its former owners into Las Vegas Star Taxi, a corporation with Eliades as its sole stockholder. In effect, then, Eliades purchased the assets of Star Taxi and put them into the new corporation. These assets included the certificate of public convenience and necessity.

11. On August 7, 1969, Mirin and Chenoweth filed a complaint in Nevada's Eighth Judicial District Court (Case No. A68495) seeking injunctive relief. They alleged substantially the same factual contentions alleged in the instant case, but there challenged the July 18, 1969, PSC allocation order as being arbitrary, discriminatory, confiscatory, and violative of due process. They attacked the July 18 order, further, as being an invalid extension, with modifications, of the December 14, 1966, PSC order. On August 22, 1969, a memorandum opinion was filed. On September 5, 1969, the district court filed its findings of fact and conclusions of law that the July 18 PSC order was *NOT* unreasonable, arbitrary or unlawful in the abstract or as applied to Mirin and Chenoweth and entered a judgment against them. On October 22, 1969, the district court filed "amended" findings of fact and conclusions of law which did not alter the previous holdings or judgment. Appeal to the Nevada Supreme Court was dismissed on March 9, 1970, without prejudice to any appeal from "any amended judgment that may be entered by the district court as a result of the order amending the findings of fact and conclusions of law." The trial court denied a motion for new trial on April 27,

1970, ruling that as to Mirin and Chenoweth the December 14, 1966, PSC order was valid and in effect as against their operations while the July 18, 1969, PSC order was being formulated. Motion for injunctive relief out of this cause of action was denied by Justice Douglas, of the United States Supreme Court, on May 5, 1970. Final appeal was dismissed by the Nevada Supreme Court on procedural grounds on September 28, 1970.

12. In late 1969, in two separate actions brought by plaintiffs' competitors contesting the PSC order of October 27, 1967, enlarging Mirin's and Chenoweth's geographical service area (see 2 above), the Nevada Supreme Court refused to consider this challenge on procedural grounds (such challenge not being timely). Mirin v. Checker, Inc., 85 Nev. 569, 459 P. 2d 774 (1969); Mirin v. Ace Cab Co., Inc., 85 Nev. 690, 462 P. 2d 523 (1969). In light of this, plaintiffs Mirin and Chenoweth now allege that under the order of October 27, 1967, an order that has been judicially upheld, they were no longer covered by the December 14, 1966, order and that the Nevada Supreme Court mandate of January 29, 1969 (see 7 above), did not apply to them.

13. On April 29, 1971, the Ninth Circuit Court of Appeals decided plaintiffs' (Mirin and Chenoweth) appeal from this Court's dismissal of their injunction suit (see 8 above). The Court of Appeals held that "dismissal of the action was proper but it should have been dismissed because the petition failed to state a claim upon which relief could be granted." The Court

also noted that "this appeal has become moot because the objective sought by way of federal injunction has come to pass" since the PSC *did* hold duly noticed public hearings. The Court ended with the statement that "(a)ny dissatisfaction appellants may have with regard to their taxicab allotment now must be channeled in the Nevada Courts" under the Nevada Revised Statute provisions allowing judicial review of PSC rulings. Mirin v. Taxi Cab Authority, 441 F. 2d 1123 (9th Cir. 1971).

14. On December 10, 1971, plaintiffs Mirin and Chenoweth filed the first complaint in the instant case, naming as defendants the State of Nevada on relation of its Public Service Commission, Noel Clark as Chairman of the PSC, and Robert List as Nevada Attorney General. On October 9, 1973, the second amended complaint was filed, adding Las Vegas Star Taxi, Inc., through its sole stockholder Pete Eliades as a party plaintiff, and naming as defendants the PSC and the Clark County Taxicab Authority (the successor of the PSC) and the individual members of each agency in their official capacity. Plaintiffs seek money damages only from the State of Nevada on relation of its Public Service Commission.

Plaintiffs have moved for partial summary judgment seeking to establish the liability of the PSC for damages or, alternatively, establish a right to injunctive relief. Defendants have moved for summary judgment in their cross-motion seeking to establish the defenses of res judicata and proper exercise of police power of the state.

Discussion

1. *Jurisdiction:* A state is not a "person" within the meaning of the Civil Rights Act (see *Williford v. California,* 352 F. 2d 474, 476 (9th Cir. 1965)), and a state agency is not subject to liability under the Act because it is not a "person" within the meaning of the Act (*Whitner v. Davis,* 410 F. 2d 24 (9th Cir. 1969); Fleming v. Cal. Adult Authority, 433 F. 2d 991 (9th Cir. 1970)). While it is not clear whether such a ruling extends to officials of a state in their official capacity, the indications are that it does. See *Deane Hill Country Club, Inc. v. City of Knoxville,* 379 F. 2d 321 (6th Cir. 1967), cert. denied 389 U. S. 975 (Tennessee was not liable as a "person" under the Civil Rights Act, thus action against Tennessee Attorney General, in his official capacity, was not maintainable). While the Ninth Circuit has ruled that the issue as to whether a named defendant is a "person" within the meaning of 42 U.S.C. § 1983 is one of whether a complaint fails to state a claim for which relief can be granted (Mirin v. Taxi Cab Authority, 441 F. 2d 1123 (9th Cir. 1971), citing Bell v. Hood, 327 U. S. 678 (1946)), the Supreme Court has recently treated this issue as being jurisdictional (see City of Kenosha v. Bruno, 412 U. S. 507, 513, 93 S. Ct. 2222 (1973)). In Bruno, the Court held that since the defendant City was not a "person" within the meaning of § 1983, either for a damages action or an action seeking equitable relief thereunder, the district court did not have jurisdiction under 28 U.S.C. § 1343. Thus, the high court has rejected the "bifurcated application (of § 1983) to

[state political entities] depending on the nature of the relief sought against them" that had begun to develop. Id. at 412 U. S. 513. This Court, therefore, does not have jurisdiction under 28 U.S.C. § 1341 over the legal and equitable actions alleged by plaintiffs against defendants under 42 U.S.C. § 1983, and these actions are dismissed sua sponte.

Jurisdiction over plaintiffs' federal constitutional claims, alleging over $10,000 in controversy as to each plaintiff, does exist pursuant to 23 U.S.C. § 1331. Cf. *City of Kenosha v. Bruno,* supra, 412 U. S. 507. Further, at this point in the discussion it may be assumed that plaintiffs' claims under the Nevada Constitution are cognizable under this Court's ancillary jurisdiction.

2. *Plaintiffs' motion for partial summary judgment; defendants' cross-motion for summary judgment:* Stripped of the conclusory legal argument incorporated by both plaintiffs and defendants in their statements of facts in their motions, the basic facts of this case are uncontested and conform to the outline of facts presented above. Plaintiffs' cab fleets were reduced in number by the challenged Nevada Supreme Court writ of mandate and the implementing order of the PSC in January 1969. In essence, it is this occurrence that plaintiffs attack as being unconstitutional. Stepping outside the contours of their complaint, plaintiffs also argue that the subsequent PSC order of July 1969 is also illegal.

(a) *Plaintiffs Mirin and Chenoweth:* As noted, these plaintiffs seek to contest the validity of forcing

them to comply in January 1969 with an allocation of cabs issued under the December 14, 1966, PSC order, an action which had the effect of reducing the number of cabs they were operating immediately prior to January 28, 1969. While their complaint does not so mention, the PSC conducted hearings and issued a new allocation order in July of 1969 pursuant to their admittedly valid power to make such allocations. Plaintiffs argue in their briefs, however, that this subsequent order, which the Ninth Circuit pointed out as mooting plaintiff's prior effort to obtain equitable relief alleging substantially the same cause of action alleged here (Mirin v. Taxi Cab Authority, 441 F. 2d 1123 (9th Cir. 1971)), is invalid. These same issues were presented to a Nevada district court in Chenoweth, et al. v. PSC, et al., Case No. A68495. In the extended litigation by Mirin and Chenoweth in that case, the state court held the December 14, 1966, PSC order was valid and in effect as against their operations while the July 18, 1969, PSC order was being formulated (id., Order on Motion for New Trial, filed April 27, 1970), and held that the July 18 PSC order was lawful and valid as against them (id., Findings of Fact, Conclusions of Law and Judgment, filed September 5, 1969). These plaintiffs were unsuccessful on various appeals of that case, and it is now final. Thus, these plaintiffs are barred by the doctrine of res judicata from again raising these issues.

> "Res judicata, 'a doctrine judicial in origin,' makes a final, valid judgment conclusive on the parties . . . as to all matters, fact and law, that were or should have been adjudicated in the proceeding." *1B Moore's Federal Practice*, p. 624.

It is clearly established that if an action is first pursued in state court and is decided on the merits, such final judgment is res judicata in a subsequent federal court action between the same parties raising the same matters. See, e.g., *Arnold v. McGuiness*, 400 F. 2d 392 (9th Cir. 1968), cert. denied 394 U. S. 918; *Johnson v. Department of Water and Power of the City of Los Angeles*, 450 F. 2d 294 (9th Cir. 1971), cert. denied 405 U. S. 1072. And, more particularly, if a state administrative action is first challenged in state court, and a final decision is rendered on the merits, the state court decision is res judicata and bars a decision by a federal court. *England v. Medical Examiners*, 375 U. S. 411 (1964); *Frazier v. East Baton Rouge Parish School Board*, 363 F. 2d 861 (5th Cir. 1966). Simply stated, "(a) final valid judgment, even though erroneous, is not subject to collateral attack." *1B Noble's Federal Practice*, p. 637.

Plaintiffs Mirin and Chenoweth seek to avoid the bar of res judicata in three ways:

First, they argue that the prior state court action was one for injunctive relief as opposed to a legal claim for damages. Plaintiffs misconstrue the importance of equitable as opposed to legal forms of relief; it is a determination of the underlying issues of fact and law that are significant. As was early recognized in the case of *Wilson Cypress Co. v. Atlantic Coast Line R. Co.*, 109 F. 2d 623, 627 (5th Cir. 1940), cert. denied 310 U. S. 653 (1940):

> ". . . While, it may not be denied that, procedurally, the form of the action is different in the two proceedings, it may equally not be denied that in substance they are the same. The emphasis which, in earlier times, was upon forms, rather than upon causes, of action, is fast disappearing if it has not already disappeared, giving place to emphasis upon the facts which when pleaded and proved in support of a claimed right, will entitle claimant to relief."

That this approach is to be applied to Nevada judgment is clearly settled. See *Miller v. Miller,* 54 Nev. 44, 3 P. 2d 1069 (1931); *Tomiyasu v. Golden,* 81 Nev. 140, 156, 400 P. 2d 415 (1965) (both cases stating that parties can litigate the same thing to judgment only once, and bar of res judicata does not depend upon the difference in relief sought in two actions but upon whether the matter put in issue in the second action between the same parties was actually in issue and adjudicated in the first action). Merely pursuing a damages remedy, therefore, does not affect the bar of res judicata.

Second, plaintiffs Mirin and Chenoweth seem to imply that legal issues different from those present here were contested in the state court action. It is clear, however, that the same matters, in terms of factual occurrences, contested in the first action are again sought to be placed in issue. The record reveals that many of the same legal issues urged here were presented before the state court. In any event, res judicata applies not only to points which a court in the first action was required to decide, but to every

point which properly belonged to the subject of litigation and which the parties might have raised by exercising reasonable diligence. *Clark v. Clark,* 80 Nev. 52, 56, 389 P. 2d 69 (1964); *Kernan v. Kernan,* 78 Nev. 93, 369 P. 2d 451 (1962); *McLeod v. Lee,* 17 Nev. 103, 28 P. 2d 124 (1882); *Frazier v. East Baton Rouge Parish School Board,* supra, 363 F. 2d 861 (5th Cir. 1966). Plaintiffs have shown no reason for believing that by exercising reasonable diligence they could not have presented all of the legal points here presented in the state action based upon the same underlying factual occurrences and matters in issue.

Third, Mirin and Chenoweth argue that they sent defendants two sets of demands for admissions, each set demanding defendants admit that Mirin v. Taxi Cab Authority, 441 F. 2d 1123 (9th Cir. 1971), is the only case relied upon in the second defense alleged in defendants' Answer to the Second Amended Complaint (the defense of res judicata), and because defendants failed to respond to these demands they must be deemed to be admitted. Plaintiffs would conclude that defendants are thus precluded from relying upon the Nevada state court Case No. A68495. Under Federal Rule of Civil Procedure 36, however, the Court may permit withdrawal of an admission thereunder

> " 'when the presentation of the merits of the action will be served thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice him in maintaining his action or defense on the merits.' (FRCP 36) This provision is made 'sub-

> ject to the provisions of Rule 16 governing the amendment of a pre-trial order.' . . . Rule 16 permits the court to modify the pre-trial order 'at the trial' to 'prevent manifest injustice.'" (*4A Moore's Federal Practice,* pp. 36-78 to 36-79.)

Further, a trial judge has discretion, in instances of a failure to reply to demands for admissions, to permit a late response to the request where no apparent delay in the proceedings is shown and no prejudice is shown. *French v. United States,* 416 F.2d 1149 (9th Cir. 1969). While Rule 36 indicates a motion by the defaulting party is the preferred form of obtaining relief, the facts in the *French* case show that such a motion is not mandatory. See id., at p. 1151. In the instant case it would be manifestly unjust to forbid defendants, who have had to deal with two amendments of the original complaint, voluminous briefs by plaintiffs and numerous discovery proceedings, from adequately raising the merits of their res judicata defense. On the other side of the scale, there appears to be no prejudice caused plaintiffs by a withdrawal of the claimed admission by default. Plaintiffs were adequately apprised of the judicial decisions relied upon by defendants in their defense of res judicata in defendants' cross-motion for summary judgment, and plaintiffs were accorded a continuance of time in which to file a response to the matters raised in that cross-motion. There was no unfair surprise or unwarranted delay caused by the failure to respond to the requests for admission. The Court therefore relieves defendants of their default in failing to answer the request for admissions regarding the defense of res judicata.

Defendants' cross-motion for summary judgment as to defendants Mirin and Chenoweth should, on the grounds that the matters raised in this case are res judicata as between the parties, be granted.

(b) *Plaintiffs Las Vegas Star Taxi, Inc., through its sole stockholder, Pete Eliades:* Defendants' cross-motion for summary judgment raises serious questions concerning the standing of this plaintiff to assert the alleged deprivations of constitutional rights of the partnership whose assets plaintiff purchased. Plaintiff contends that because this issue was not plead as an affirmative defense in defendants' answer to the second amended complaint, Federal Rule 8(c), FRCP, forecloses its now being raised. Even if the question of standing is subject to Rule 8(c), a doubtful proposition, the result sought by plaintiff simply does not obtain.

> "While there is some authority that a defendant may not, subsequent to answer, move for summary judgment on the basis of an affirmative defense not pleaded in his answer, this position is not tenable in view of the general purpose of the Rules that decision should go on the merits and not on pleading technicalities, and for the further reason that the Rules prescribe most liberally for the amendment of pleadings." (*6 Moore's Federal Practice,* p. 2492.)

Standing to sue is an element of the federal constitutional concept of "case or controversy" and thus goes to the jurisdiction of the federal court to act.

This issue has been inadequately briefed by the parties. The motion for partial summary judgment, and the cross-motion by defendants for summary judgment against plaintiff Las Vegas Star Taxi, Inc., is therefore deferred, and the parties are instructed to file supplemental briefs concerning the issue of that plaintiff's standing to raise the issues alleged in the second amended complaint.

CONCLUSION

1. Defendants are instructed to file findings of fact, conclusions of law, and proposed summary judgment consistent with this opinion in regard to their cross-motion for summary judgment as against plaintiffs Mirin and Chenoweth.

2. Defendants shall file, within 20 days of the entry of this opinion, a supplemental brief on the issue of plaintiff Las Vegas Star Taxi's standing to sue, and said plaintiff shall file a brief in response within 20 days thereafter, at which time the plaintiffs' motion for partial summary judgment and the defendants' cross-motion for summary judgment as to plaintiff Las Vegas Star Taxi, Inc., will stand submitted.

Dated: December 27, 1974.

/s/ Roger D. Foley
District Judge

In the United States District Court
For the District of Nevada

Civil LV-1738 RDF

William Mirin, dba Strip Cab Co., Raymond Chenoweth, dba Nellis Cab Co., Las Vegas Star Taxi, Inc., through its sole stockholder, Pete Eliades dba Star Taxi Co.,
Plaintiffs,

vs.

The State of Nevada on Relation of Its Public Service Commission; Noel Clark, Evo Granada and Heber Hardy, acting in their official capacity; The Taxicab Authority of Clark County, a State Agency; Manuel Cortez, James Jones, Joe La Voie, and B. J. Handlon, acting in their official capacity,
Defendants.

[Filed Aug. 1, 1975]

ORDER ON MOTIONS

On December 27, 1974, this Court filed an opinion entitled "Memorandum re Plaintiffs' Motion for Partial Summary Judgment, Filed January 15, 1974, and Defendants' Cross-Motion for Summary Judgment, Filed February 21, 1974". On page 15, there appears this Court's two-paragraph conclusion reading as follows:

"1. Defendants are instructed to file findings of fact, conclusions of law, and proposed summary judgment consistent with this opinion in regard to their cross-motion for summary judgment as against plaintiffs Mirin and Chenoweth.

"2. Defendants shall file, within 20 days of the entry of this opinion, a supplemental brief on the issue of plaintiff Las Vegas Star Taxi's standing to sue, and said plaintiff shall file a brief in response within 20 days thereafter, at which time the plaintiff's motion for partial summary judgment and the defendants' cross-motion for summary judgment as to plaintiff Las Vegas Star Taxi, Inc., will stand submitted."

The first paragraph of page 15, above quoted, is deleted and the following substituted therefore:

1. Except for those portions of the fourteen paragraphs of facts in the memorandum that deal only with Las Vegas Star Taxi, Inc., and/or Pete Eliades, the said memorandum of December 27, 1974, constitutes this Court's findings of facts and conclusions of law. Let summary judgment be entered in favor of the defendants and against the plaintiffs William Mirin and Raymond Chenoweth.

2. Plaintiffs' motion for summary judgment is denied.

3. Defendants' motion for summary judgment against Las Vegas Star Taxi, Inc., is denied. Las Vegas Star, Inc. has standing to sue.

4. Plaintiffs' motion for reconsideration is denied.

5. Plaintiffs' motion for certification of appeal is denied.

This case falls within the provisions of Rule 54(b) of the Federal Rules of Civil Procedure. Summary judgment entered this date in favor of the defendants and against the plaintiffs William Mirin and Raymond Chenoweth is a final judgment as to them and the Court sees no reason with entry of final judgment should be delayed. Thus, plaintiffs Mirin and Chenoweth may appeal from the summary judgment against them.

Dated: July 31, 1975.

/s/ Roger D. Foley
District Judge

In the United States District Court
For the District of Nevada

Civil LV-1738 RDF

William Mirin, dba Strip Cab Co., Raymond Chenoweth, dba Nellis Cab Co., Las Vegas Star Taxi, Inc., through its sole stockholder, Pete Eliades dba Star Taxi Co.,
Plaintiffs,

vs.

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Defendants.

[Filed Aug. 1, 1975]

SUMMARY JUDGMENT

In accordance with the memorandum decision of this Court of December 27, 1974, as amended by order on motions of July 31, 1975,

IT IS ORDERED that defendants' motion for summary judgment against plaintiffs William Mirin

and Raymond Chenoweth shall be, and the same is, hereby granted.

Dated: July 31, 1975.

/s/ Roger D. Foley
District Judge

Supreme Court, U. S.
FILED
JUN 3 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76–1516

WILLIAM MIRIN, dba STRIP CAB CO., and RAYMOND CHENOWETH, dba NELLIS CAB CO.,

Petitioners,

v.

THE STATE OF NEVADA ON RELATION OF ITS PUBLIC SERVICE COMMISSION; NOEL CLARK, EVO GRANATA and HEBER HARDY, acting in their official capacity; THE TAXICAB AUTHORITY OF CLARK COUNTY, a State Agency; MANUEL CORTEZ, JAMES JONES, JOE LaVOIE, and B. J. HANDLON, acting in their official capacity,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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IN THE SUPREME COURT OF THE

UNITED STATES

October Term, 1976

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RAYMOND CHENOWETH, dba NELLIS CAB CO.,

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RESPONDENTS' BRIEF IN OPPOSITION

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS

1. Whether the United States Court of Appeals for the Ninth Circuit was correct in ruling that denial of petitioners' Motion for Reconsideration did not constitute an abuse of discretion by the District Court.

2. Whether this petition is a proper vehicle for petitioners to use in seeking redress of a personal grievance against their former counsel.

STATEMENT

The pertinent facts of the case are set forth fully in the decisions of the District Court (Petitioners' Appendix B at pp. vii-xv) and the Court of Appeals (Petitioners' Appendix A at pp. ii-xii).

ARGUMENT

The respondents oppose the petition for a writ of certiorari on two grounds:

1. THE COURT OF APPEALS PROPERLY DECIDED THAT DENIAL OF RECONSIDERATION BY THE DISTRICT COURT OF ITS MEMORANDUM DECISION GRANTING SUMMARY JUDGMENT AGAINST PETITIONERS WAS NOT AN ABUSE OF ITS DISCRETION.

Approximately eight weeks after entry of the District Court's memorandum

opinion granting the summary judgment herein attacked, petitioners proffered to the District Court two uncorroborated affidavits of an ex-employee of one of petitioners' competitors. (R. 1020-1023) These affidavits were extended in support of petitioners' previously filed motion for reconsideration. Five and one-half months thereafter, having had ample opportunity to assess the probative value, credibility, and relevance, if any, of the affidavits, the District Court denied the motion for reconsideration and entered summary judgment as against petitioners herein. (Petitioners' Appendix B at pp. xxv-xxiv)

One of the affidavits is dated June 13, 1974. (R. 1021) This would suggest that petitioners awaited the initial disposition of their cause by means of the memorandum decision of the District Court, and then, upon discovering that the decision was not favorable and prior to entry of judgment, produced the affidavits in a desperate attempt to get the District Court to alter its decision, which had been made exclusively on facts to which petitioners had willingly stipulated.

The Court of Appeals characterized disposition of petitioners' request for reconsideration as lying within the discretion of the District Court. (Petitioners' Appendix A at p. vii) Petitioners admit this, but they contend that the District Court abused its discretion. This is the only point of dispute between petitioners and both the District Court and the Court of Appeals, yet petitioners' argument falls far short of justifying review of this issue on certiorari.

The appellate court, making an independent determination, deemed the bare affidavits to be of no significance with respect to the merits of petitioners' underlying claims. (Petitioners' Appendix A at p. vii) Certainly, rhetoric alone will not supplant the true indicia of credibility vital to elevating inherently suspect, self-serving affidavits to the level of proof necessary to satisfy the conditions of relief discussed in U.S. Throckmorton, 98 U.S. 61 (1878) upon which petitioners seek to rely. Thus, petitioners err at the outset by assuming the conclusion they seek, i.e. that their attorney sold out their interest to the other side. The Throckmorton test for relief from judgment requires both proof of fraudulent representation and a showing by petitioner that he ". . . has been prevented from presenting all of his case to the court." 98 U.S. at 66. Because petitioners satisfied neither of these mandatory parts of the Throckmorton test, both the District Court and the Court of Appeals elected properly to exercise their discretion in refusing to relieve petitioners from the valid, final judgment entered against them. Petitioners have offered no credible proof of the alleged sell-out by former counsel. Neither have they established any nexus between former counsel's actions and petitioners' claims in the District Court action, causes which the Court of Appeals deemed "meritless." (Petitioners' Appendix B at p. vii)

In addition to the afore-referenced considerations, this case is an inappropriate means of pursuing legal action against former counsel.

2. THE INSTANT PETITION IS NOT A PROPER VEHICLE FOR SEEKING REDRESS OF GRIEVANCES AGAINST FORMER COUNSEL.

Even apart from the above discussion relative to the proper exercise of discretionary functions by the courts, the instant petition should fail because it is an ancillary attempt by petitioners to redress a grievance presently being actively litigated in another forum. In Chenoweth et al. v. Hilbrecht, Case No. R 76-23 BRT in the United States District Court for the District of Nevada, these identical petitioners seek damages from their former counsel, averring in substance the same considerations which they now urge this Court to accept as proof that the District Court abused its discretion. In other words, petitioners are attempting to litigate the question of their former counsel's integrity concurrently in two courts.

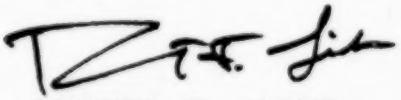
Thus, it is within the sound discretion of this Honorable Court, inasmuch as there is no important constitutional question raised, to deny outright the instant Petition. U.S. Sup. Ct. Rule 19(1), 28 U.S.C.A.

CONCLUSION

For the reasons stated, the decision of the United States Court of Appeals for the Ninth Circuit, which affirms the United States District Court for the District of Nevada in granting a summary judgment against Petitioners herein and for Respondents should be affirmed.

Respondents respectfully suggest that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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